

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Kenneth L. Latham

File: B-245137

Date: December 18, 1991

Kenneth L. Latham for the protester,
Dave Cattoor, an interested party,
James L. Weiner, Esq., and Justin P. Patterson, Esq.,
Department of the Interior, for the agency.
Susan K. McAuliffe, Esq., and Michael R. Golden, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

Unsuccessful offeror's protest based on ground that it should have been selected for award of firm, fixed-price requirements contract because it proposed the lowest price is denied where the solicitation made technical considerations more important than cost and agency, which found awardee's proposed price reasonable and consistent with its technical proposal, reasonably concluded that the technical superiority of the awardee's proposal was worth the additional cost.

DECISION

Kenneth L. Latham protests the award of a contract (No. N651-C1-3063) to Dave Cattoor by the Department of the Interior, Bureau of Land Management, under request for proposals (RFP) No. N651-RFP1-3046, for the gathering of wild horses and burros in the state of Nevada. Latham contends that the agency improperly found the awardee's offer the most advantageous to the government and argues that the agency should have awarded the contract, or at least part of the contract, to the protester because Latham's proposal was found to be technically acceptable and proposed the lowest price.

We deny the protest.

The RFP, issued on May 7, 1991, contemplated the award of a 1-year firm, fixed-price requirements contract for the gathering of wild horses and burros from all counties within

the state of Nevada. The contractor is to provide all labor, materials, and equipment (except for a limited amount of government-furnished property), subsistence and other resources necessary to perform the RFP's specifications for the safe and humane capture, care and transportation of the animals to agency-designated destinations. The RFP called for the submission of cost and technical proposals and provided that award would be made to the responsible offeror that submitted the proposal which was the most advantageous to the government, considering price and technical factors.

The RFP set forth two primary technical evaluation factors for award--the offeror's proposed technical approach (worth 80 points of the available 100 points) and the qualifications and experience of the organization and proposed key personnel (worth 20 points). The RFP listed several subfactors for each of these two technical evaluation factors. The technical approach criterion included the offeror's demonstrated understanding of the proper procedures to be used in the capture, humane handling and transport of the animals, as well as the adequacy of the proposed equipment, temporary holding facilities, security measures, and helicopter support and communications. The technical qualifications factor included the degree of overall experience of the organization, proposed key personnel and helicopter pilots, and the proposed organization of the offeror's work force regarding the capture, care and transportation of the animals. The RFP emphasized that "[p]rice will be of lesser relative importance than the aforementioned technical factors. Therefore, the government reserves the right to award a contract to other than the lowest priced proposal." Offerors were informed, however, that "between responsive, acceptable proposals that are evaluated as substantially equal in quality, the cost to the government will be a selection factor." The solicitation instructed offerors that price proposals were to be evaluated for accuracy, reasonableness and realism, as well as the "trackability of the price proposal to the offeror's technical proposal" and that price proposals "shall be used as an aid to determine the offeror's understanding of the requirements of the RFP."

Two proposals (Latham's and Cattoor's) were received by the June 7 closing time for the receipt of proposals. The technical proposal evaluation committee found Cattoor's proposal technically acceptable and Latham's proposal technically acceptable with modification. On June 28, the agency issued written discussion questions to each offeror. Latham was requested to submit additional information regarding his proposed equipment and methodology for trapping, restraining and transporting the animals. The protester was also advised to review his proposed price, which the agency considered low in light of the

solicitation's requirements. Best and final offers (BAFO) were received on July 12. Both offerors' technical proposal scores were increased as a result of discussions and the agency's evaluation of the BAFOs. Although Latham's technical proposal score increased from 570 to 730 after BAFOs (the evaluation scheme provided for a factor of 10 to be applied to the technical evaluation points received), Cattoor's technical proposal increased to a perfect score of 1,000. Latham's price proposal, after BAFOs (calculated as an average unit price of \$67.12 per animal), received a perfect score of 1,000 points; Cattoor's price proposal (averaged at \$85.28 per animal) received a score of 787.10. Latham received a BAFO combined technical/price score (formulated by adding 70 percent of the BAFO technical point score multiplied by 10, to 30 percent of the BAFO price point score multiplied by 10) of 811; Cattoor's BAFO combined score was 936.1. An award under the RFP was made to Cattoor on July 24 on the basis that his offer was most advantageous to the government. Latham filed a protest with our Office on August 8 against that award.

Latham generally challenges the agency's award to Cattoor and contends that since the protester and Cattoor allegedly submitted substantially equal technical proposals under a previous similar procurement, the two offers must be substantially equal here.¹ Latham therefore argues that the terms of the present RFP (stating that cost is a selection factor for award between substantially equal technical proposals), and the public interest in saving money on this procurement, require the agency to make an award to the protester since he submitted the lowest-priced proposal. Latham also protests the agency evaluators' failure to consider the comparative number of animal deaths incurred by the offerors during their past performance of similar contracts. In this regard, Latham contends that since the safety and humane treatment of the horses and burros is of paramount concern under the RFP, Cattoor's proposal should have been downgraded because Cattoor has incurred more animal deaths during his prior wild horse and burro gathering operations than has the protester.

¹Latham protests the agency's use of the technical proposals as the primary factor for award and argues that the agency instead should have made award to the lowest technically acceptable offeror. Since the RFP stated the evaluation factors for award (i.e., that technical considerations were to be given more weight than price), Latham's protest of the evaluation criteria is untimely since apparent solicitation improprieties must be protested prior to the closing time for the receipt of proposals. Latham filed his protest with our Office on August 8, nearly 8 weeks after the June 7 closing time.

The agency responds that the evaluation of proposals was proper and consistent with the RFP's evaluation factors for award. In response to the protester's allegation that his technical proposal was substantially equal to the awardee's proposal, the agency reports that Cattoor's present technical proposal was, in fact, ranked substantially superior to Latham's proposal and was more detailed than the Cattoor proposal received for the previous procurement. As to the evaluation of the protester's proposal, the agency explains that Latham's technical proposal remained weak in a number of areas, despite the opportunity for revision after discussions. In particular, the agency found that Latham's proposal failed to provide adequate detail regarding the proposed methodology and personnel to be used to rope animals and ensure they will not be tied down for more than 1 hour (as required by the RFP), that the protester's proposal failed to adequately address reuniting mares with foals if separation occurs, and that the protester failed to address the importance of weather conditions, terrain, or distance to be traveled when planning the transport of animals from the trap sites to the temporary holding facilities.

As to the protester's challenge to the agency's failure to consider prior animal deaths, the agency explains that this was not an evaluation factor for award and that the RFP did not request information from the offerors regarding such losses--the agency also notes that the protester does not provide any credible evidence demonstrating Cattoor's losses or comparing the awardee's animal deaths with its own losses. The agency adds that even if the awardee had suffered more animal losses than the protester, the awardee has gathered substantially more animals than the protester and thus may have reasonably experienced greater numerical losses than the protester, but not greater losses on a percentage basis. The agency concludes that the awardee's technically superior proposal demonstrates that Cattoor has learned from his substantial wild horse and burro gathering experience and that Cattoor submitted an excellent proposal which demonstrates Cattoor's capability to ensure the safety and humane treatment of the animals. The agency states that it made a proper cost/technical tradeoff in its decision to award to Cattoor and that such a tradeoff was contemplated by the RFP.

Our review of the record shows that the evaluation of proposals was reasonable and supports the finding that Cattoor submitted a technical proposal which was superior to Latham's technical proposal. While the protester generally addressed each of the solicitation requirements, the record shows that Latham reasonably did not receive the maximum points available because he failed to describe his proposed methodology and use of personnel in adequate detail.

Regarding the driving and trapping of animals, the agency found Latham's proposal--which failed to emphasize the rate of movement and distance to be traveled in regard to trap location--proposed an inadequate number of personnel to rope the animals and drive the trucks at the same time. Since the RFP requires that animals not be tied down for more than 1 hour, we find that the limited number of personnel proposed by the protester reasonably led the agency to question whether Latham would be able to meet this requirement, despite his proposal's statement that animals would be loaded "immediately." Also, although Latham states in his protest submission that each herd gathering operation presents unique conditions and that his firm can meet those situations, our review of the record shows that Latham's proposal failed to provide sufficient detail regarding his proposed methodology to adequately handle the reuniting of mares with foals if separation occurs, and failed to give appropriate consideration to the importance of weather conditions, terrain, and the distances to be traveled in scheduling the transport of the animals. Our review also confirms the reasonableness of the agency's concerns about the lack of detail in Latham's proposal regarding his proposed runways and loading chutes since the proposed placement and layout of the "fly chute" may not promote efficiency in handling the animals and a potential hazard may result by forcing the animals into an enclosed area. We also have no reason to question the agency's determination that Latham may not have fully understood the scope of the contract (particularly regarding the RFP's requirement for restraining the animals) because his price proposal, even after the protester was advised of the agency's concerns that Latham's labor costs could be expected to increase by 25 to 40 percent because of the need to restrain a large number of the animals caught, remained unchanged and significantly lower than the agency had expected would be necessary to meet the solicitation's requirements.

In contrast, our review of the record shows that Cattoor's technical proposal offered the agency substantial contractor experience (the awardee has gathered 46,300 horses and 3,000 burros compared to Latham's capture of 12,600 horses and 300 burros) and reasonably received a high technical proposal score for detailing proper techniques and procedures for his trap sites, handling of animals, restraining and sorting of the animals, and for reducing the possibility of animal injuries.² Regarding trapping by helicopter, for

²Regarding Latham's contention that the agency should have considered the offerors' prior animal deaths in its evaluation of the proposals, the RFP, as the agency correctly points out, did not request this information and did not include it as an explicit evaluation factor for award.

example, Cattoor explained in detail how he would address the rate of movement and distance limitations. With regard to the design of proposed traps, Cattoor outlined steps to prevent injury to horses and to promote efficiency of trap layout. Cattoor also provided a more descriptive and organizational structure.

Generally, the government is not required to make an award to a technically acceptable firm offering the lowest price under an RFP unless the RFP specifies that price will be the determinative factor. Here, the RFP award criteria did not require award to the low-priced offeror. It, in fact, expressly advised that the contract would not necessarily be awarded to the low-priced offeror, that technical consideration would be involved, and that these technical concerns were more important than price. Thus, under the RFP, the agency was required to take both technical considerations and price into account, and make an appropriate judgment as to whether one offeror was technically superior to another and if so whether that superiority was worth any price premium involved. In other words, the RFP required the agency to make a cost/technical tradeoff. See Encon Management Inc., B-234679, June 23, 1989, 89-1 CPD ¶ 595. Cost/technical tradeoffs may be made in selecting an awardee subject only to the test of rationality and consistency with the established evaluation factors. Maytag Aircraft Corp., B-237068.3, Apr. 26, 1990, 90-1 CPD ¶ 430. Accordingly, we will object to a tradeoff where a reasonable basis is not evident from the record. Avanco Int'l, Inc., B-241007.2, Mar. 13, 1991, 91-1 CPD ¶ 276.

As stated above, the technical evaluation factors (technical approach and the experience of the organization and key personnel) were more important than price. While the record shows that Latham submitted an acceptable proposal at a price approximately 20 percent lower than Cattoor's price, the latter's proposal was rated 27 percent higher technically than the protester's proposal. Our review of the proposals and the agency's technical evaluation supports the reasonableness of the agency's determination that Cattoor's proposal presented substantial technical

Thus, the agency was not required to consider the animal deaths in the technical evaluation. Rather, the RFP called for offerors to show in their proposals a proposed approach that demonstrated an understanding of the proper procedures and techniques for promoting the safety and humane treatment of the animals. Our review of the evaluations of both offerors' proposals shows that each offeror's proposed methodologies, techniques, and procedures in this regard were considered by the agency. Cattoor's proposal demonstrated the requisite understanding.

superiority and that Cattoor's offered price, although higher than Latham's, was reasonable and consistent with his technically superior proposal. In view of the agency's reasonable determination that the awardee's proposal was technically superior, as discussed above, and the legitimate concerns regarding Latham's approach, experience, and unexplained low labor hours to perform the work, we find no reason to question the reasonableness of the agency's cost/technical tradeoff which was conducted in accordance with the terms of the solicitation. We find reasonable the agency's determination that the awardee's technical superiority merited the additional cost associated with its proposal.³


The protester also contends that the award to Cattoor for the entire state of Nevada creates a monopoly, in contravention to the requirements for competition, since Latham (the "only unsuccessful" offeror) is precluded by the award to Cattoor from performing any of these gathering services for the agency in Nevada. Latham argues that since the agency has made multiple awards in the past to meet its Nevada gathering requirements, it should award part of this contract to Latham. Latham also contends that he has been disadvantaged by the award to Cattoor since only Cattoor will have this additional experience to offer the agency during future similar procurements.

Although the agency may have made multiple awards to meet its previous gathering requirements in the state of Nevada, the agency was not required by any procurement statute or regulation or by any RFP language to do so here. Moreover, we do not find that the protester could have reasonably expected that the agency would award multiple contracts under the solicitation since the cover page of the RFP stated the following: "NOTICE: It is anticipated that one (1) contract for the entire state of Nevada will be awarded under this solicitation." As for Latham's suggestion that the award to Cattoor for the entire state of Nevada is improper because it will have a restrictive effect on future procurements since Cattoor will have substantially more experience to offer the agency than Latham, we cannot find any evidence of impropriety here. The contract was awarded to Cattoor in accordance with the terms of the RFP, Latham

³Latham also contends that the agency appointed the members of its technical evaluation committee during the development of the solicitation instead of waiting for the contracting officer to determine that there were adequate proposals. While apparently this was the case, we find no impropriety in the agency's conduct and Latham does not provide any information to suggest that the protester has been harmed in any way by the alleged procedural irregularity.

fairly competed for the award, and there is no evidence in the record before us that suggests any preference or unfair action by the agency to create a competitive advantage for one offeror. See DOD Contracts, Inc., 70 Comp. Gen. 170 (1991), 91-1 CPD ¶ 13.

The protest is denied.


for James F. Hinchman
General Counsel